

ESSAY

A TALE OF TWO LAWYERS

*Paul D. Carrington**

The careers of two 19th century American lawyers put in bold relief the constructive role that American lawyers are called to play in our public life. The role was shaped in important respects by deliberate men who had led a revolution. It was already in the minds of Thomas Jefferson and George Wythe¹ at the time they drafted our Declaration of Independence, and it was widely shared among members of that generation who survived the American War for Independence.²

Contrary to a common belief,³ their concept of an American legal profession was not derived from English sources. American revolutionaries, even many of the conservative followers of Alexander Hamilton, did not greatly admire the English bar and they reviled the feudal English society of which that profession was a manifestation.⁴ They recognized that the stability of English society in their day was provided by an aristocracy who, through the political power of the House of Lords, protected their own wealth and status, and by doing so, forestalled the more violent disorders that might otherwise have

* Chadwick Professor of Law, Duke University. The larger work of which this is a part has been supported by grants from the John Simon Guggenheim, Rockefeller, and Keck Foundations and by the E. T. Bost fund of the Duke University School of Law. Earlier versions were presented at the University of Michigan and the University of Illinois. Derek Apanovitch, Erika King, and Erik Belenky helped with the references and helped clarify the text.

¹ Wythe was Jefferson's law teacher and co-draftsman of the Declaration of Independence. Among his biographies are IMOGENE BROWN, *AMERICAN ARISTIDES* (1981), and WILLIAM CLARKIN, *SERENE PATRIOT: A LIFE OF GEORGE WYTHE* (1970).

² Paul D. Carrington, *The Revolutionary Idea of University Legal Education*, 31 WM. & MARY L. REV. 527 (1990).

³ E.g., James Bradley Thayer, *The Teaching of English Law in Universities*, 9 HARV. L. REV. 169 (1895).

⁴ For example, Charles Cotesworth Pinckney of South Carolina, an Oxford graduate who had trained at Temple Bar and whose wife owned 800 slaves, was among the most passionate of revolutionaries; he enlisted in Washington's army, rising to the rank of brigadier general. He also led the campaign for ratification by South Carolina, dismissing the rhetoric of states' rights. His biography is MARVIN R. ZAHNISER, *CHARLES COTESWORTH PINCKNEY, FOUNDING FATHER* (1982). Abigail Adams, while serving as the wife of the American minister in London, expressed her revulsion at the English ruling class. Letter from Abigail Adams to Thomas Jefferson (Feb. 26, 1788) in 12 PAPERS OF THOMAS JEFFERSON 624 (Julian P. Boyd ed., 1955); see also James Kent, *An Introductory Lecture to a Course of Law Lectures*, 3 COLUM. L. REV. 330, 331 (1903).

held sway in parliamentary politics and in the streets of London. Law and the legal profession played no significant role in English politics.

American revolutionaries were keenly aware that few institutions in their own small colonial societies were able to perform the stabilizing role of the English aristocracy.⁵ Those who established the thirteen miniature republics were on this account almost universally pessimistic about the prospect that their institutions of self-government could be maintained.⁶ They were all well informed about the failure of earlier republics in Greece, in early Rome, and in medieval Florence⁷ and Venice. Montesquieu, the most widely read political theorist of the time,⁸ foretold the destiny of republics to collapse through a process beginning with factionalism that degenerates into disorder, resulting in chaos always resolved by despots. The classics, which all educated Americans of that time had read, taught that even if "every Athenian was a Socrates, every Athenian assembly would still have been a mob."⁹ Montesquieu had asserted, and many early Americans believed, that the only chance of keeping a republic lay in nurturing a popular belief in law. Only a people who loved their laws, it was held, could hope to continue to govern themselves.¹⁰

In this belief, state constitutions were ratified in each of the thirteen states that envisioned with varying degrees of clarity the use of law to cabin legislative misadventures—misadventures that would result in the factionalism and ultimately in the disorder, chaos, and despotism they feared. The federal Constitution of 1787 was an expression of the same fear. The one purpose shared by all who drafted and signed that instrument was to establish a federation capable of preventing the dreaded spread of disorder across the continent. In the minds of many who framed and ratified it, the most essential provision of that Constitution may have been the one obligating the federal government to guarantee to each state a republican form of government.¹¹

The founders thus created legal institutions having important political responsibilities. They introduced a large element of law into American politics. And it followed that they had introduced a large element of politics into American law. The legal profession, of which

⁵ BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967).

⁶ See generally GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 471-564 (1969).

⁷ J.G.A. Pocock, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

⁸ PAUL M. SPURLIN, *MONTESQUIEU IN AMERICA, 1760-1801* (2d ed. 1969).

⁹ CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF LAWS* (Thomas Nugent trans., 1750).

¹⁰ MONTESQUIEU, *supra* note 9, at Book IV, Chap. 5.

¹¹ Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 517-18 (1962).

the courts are a part, was assigned a major political role—a role quite unknown to the English bar.

Tocqueville would soon recognize American lawyers' political role as analogous to the role of European aristocracies.¹² He did not, as some believe, think of American lawyers he met as persons of elevated social status.¹³ Rather, in speaking of the first members of our profession as aristocrats, he was observing that the American legal profession is a source of the political stability long provided in Europe by the institutions of feudalism.

Given their pessimism, many of the founders would have been surprised to know that the republic they established would long endure. But it would have surprised none to learn that most of its presidents and legislators were lawyers, as they were for the first century of our national life, or that the Supreme Court would come to perform an important political function.

At the time of the Revolution, the existing legal professions of the thirteen republics seemed a very weak reed on which to rely. The royal judiciary had fled during the war, as had many leaders of the colonial bars who had been loyal to the crown.¹⁴ The need for a new American legal profession was evident to many. The closest existing model was the Parisian order of barristers, who had for a time played a significant political role in enforcing legal constraints limiting the prerogatives of the French crown—constraints imposed by the French *parlement*.¹⁵ There was also an earlier model in the political role played by Roman jurists beginning in late republican times.¹⁶

Jefferson and Wythe were well versed in these traditions, and they were Francophiles.¹⁷ It is therefore unsurprising that they were the first to embark on the task of training a public profession of the law. They did so in 1779, while the war for independence was still being waged, by establishing the Law Department at the College of William and Mary.

But others thought along like lines. Also during the war, the trustees of Dartmouth directed the president of their college to begin training lawyers as leaders of the new republic.¹⁸ The trustees of

¹² ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 296-300 (Henry Reeve trans., 1904).

¹³ Geoffrey C. Hazard, *The Future of Legal Ethics*, 100 *YALE L. J.* 1239 (1991).

¹⁴ CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* 212-13 (1911).

¹⁵ DAVID A. BELL, *LAWYERS AND CITIZENS: THE MAKING OF A POLITICAL ELITE IN OLD REGIME FRANCE* 33-35, 58-59 (1994).

¹⁶ JOHN P. DAWSON, *THE ORACLES OF THE LAW* 107-13 (1967).

¹⁷ Jefferson's views on France are summarized in STANLEY ELKINS & ERIC MCKITTRICK, *THE AGE OF FEDERALISM: THE EARLY AMERICAN REPUBLIC, 1788-1800*, at 314-17 (1993).

¹⁸ JAMES FAIRBANKS COLBY, *LEGAL AND POLITICAL STUDIES IN DARTMOUTH COLLEGE, 1796-1896*, at 3, 4 (1896); see also LEON BURR RICHARDSON, *HISTORY OF DARTMOUTH COLLEGE* 120 (1932).

Brown had the same ambition.¹⁹ The president of Yale studied law in order to teach it in the post-war era to a new generation of public lawyers.²⁰ The president of Princeton began lecturing to his students on law.²¹ Alexander Hamilton, as a trustee of Columbia, sought the financial support of New York to establish a law department.²² Failing to obtain such support, he nevertheless secured the appointment of James Kent as Professor of Law.²³ A similar approach was made by Yale to the state of Connecticut,²⁴ and by the heroic medical doctor, Benjamin Rush of Philadelphia,²⁵ to the Commonwealth of Pennsylvania.²⁶ The trustees of the University of Pennsylvania secured the services of James Wilson, a signer of the Declaration and a Justice of the Supreme Court of the United States to teach law in their university.²⁷

I will not here burden the reader with the story of those efforts and many more that were conducted in antebellum America. It is sufficient to acknowledge their many failures and disappointments, and to notice also much persistence. One of the more successful efforts was that of Timothy Walker,²⁸ one of Joseph Story's first students at Harvard and the primary founder of the law school at Cincinnati, which was for a time the largest city in the west. Walker explained to his students that

We are trying the greatest political experiment the world ever witnessed; and the experience of all history warns us not to feel too secure. A voice from the tombs of all departed republics tells us that if our liberty is to be ultimately preserved, it is at the price of sleepless vigilance. I refer not to foreign aggression, for this we have nothing to fear; our only foes are those of our own household. Domestic aggression may

¹⁹ WALTER C. BRONSON, *THE HISTORY OF BROWN UNIVERSITY, 1764-1914*, at 38 (1914).

²⁰ ABIEL HOLMES, *THE LIFE OF EZRA STILES* 25 (1798); EDMUND MORGAN, *THE GENTLE PURITAN: A LIFE OF EZRA STILES, 1727-1795*, at 391 (1962).

²¹ His lectures were published as SAMUEL STANHOPE SMITH, *THE LECTURES, CORRECTED AND IMPROVED, WHICH HAVE BEEN DELIVERED FOR A SERIES OF YEARS IN THE COLLEGE OF NEW JERSEY ON THE SUBJECT OF MORAL AND POLITICAL PHILOSOPHY* (1812).

²² CHARLES WARREN, *THE HISTORY OF THE HARVARD LAW SCHOOL AND OF EARLY LEGAL CONDITIONS IN AMERICA* 165-68 (1908).

²³ For a brief account of Kent's appointment, see John H. Langbein, *Chancellor Kent and the History of Legal Literature*, 93 COLUM. L. REV. 547, 548-60 (1993); see also *A HISTORY OF THE SCHOOL OF LAW, COLUMBIA UNIVERSITY* 8-25 (Julius Goebel ed., 1955).

²⁴ WARREN, *supra* note 22, at 165.

²⁵ For a brief account of Rush's extraordinary career, see Richard H. Shryock, *Benjamin Rush*, 16 *DICTIONARY OF AMERICAN BIOGRAPHY* 227 (Dumas Malone ed., 1935).

²⁶ JAMES H. MORGAN, *DICKINSON COLLEGE, THE HISTORY OF ONE HUNDRED AND FIFTY YEARS, 1783-1933*, at 10-33 (1933).

²⁷ EDWARD P. CHEYNEY, *HISTORY OF THE UNIVERSITY OF PENNSYLVANIA 1740-1940*, at 158 (1940). Wilson's lectures were published in *THE WORKS OF THE HONOURABLE JAMES WILSON* (B. Wilson ed., 1804), and republished in 1 *THE WORKS OF JAMES WILSON* (Robert G. McCloskey ed., 1967).

²⁸ WALTER T. HITCHCOCK, *TIMOTHY WALKER, ANTEBELLUM LAWYER* 63-66 (1990).

come from two quarters. On the one hand, power [and wealth are] always tending to augmentation. Those who have some, employ it to gain more; and if not seasonably withstood, become too strong to be resisted. And on the other hand, liberty is always tending to licentiousness. The more men have, the more they are likely to want. Being free from many restraints, they would do away with all. Now when dangers threaten, from either of these quarters; when [the powerful] would trample the law under their feet, or mobs would rise to overthrow it; who are the sentinels to give the alarm? Do I assume too much in saying [those] whose profession it is to watch over the law?²⁹

How might Dean Walker and others engaged in the enterprise of creating a public profession to serve as sentinels to democracy pursue that objective? How might individuals eager to be sentinels prepare themselves for that role? These were questions receiving much attention in the decades following the ratification of the federal Constitution. Jefferson and the others hoped to find answers in higher education. Alas, the colleges and universities of that time were small and weak. Higher education could attract only a few students. Those who came were often very young and ill-prepared.³⁰ And they could remain in colleges only for brief periods.

The largest law department in 1840 was at Transylvania University in Lexington, Kentucky.³¹ In that year, it was served by a faculty of four, all of whom served part-time. The four included the Chief Justice of Kentucky and another member of his court, both judges of national repute. They had 70 students drawn from all parts of the Mississippi valley. Their academic year was about five months; students attending for two such years might secure a law degree. The curriculum at Transylvania provided its students with the knowledge that the faculty deemed most useful to persons preparing for public life. It taught constitutional law, international law, comparative law, political economy, and only a modest dose of private law. The faculty also preached to their students the great importance of the federal union. Henry Clay, the mediator of sectional differences, was the guiding light of the institution as well as its sometime professor and trustee, and he had the support of almost all its faculty. Many of its alumni entered public life. As many as thirty sat in the Senate of the United States. Two were vice presidents. One, John Marshall

²⁹ TIMOTHY WALKER, *INTRODUCTION TO THE STUDY OF LAW* 1-2 (1837). It is not hard to find a source for Walker's thought. Compare the words of Walker's teacher, Joseph Story, concluding 3 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 756-60 (1st ed., Boston, 1833).

³⁰ For example, the University of Pennsylvania, the only institution in the largest city in America, was admitting children as young as twelve years old, and yet could find only a score or so students. CHEYNEY, *supra* note 27, at 184-92.

³¹ See Paul D. Carrington, *Teaching Law and Virtue at Transylvania University: The George Wythe Tradition in the Antebellum Years*, 41 *MERCER L. REV.* 673 (1990).

Harlan,³² served on the Supreme Court. Ninian Edwards was an early Governor of Illinois.³³ Seven Transylvania alumni were among the fifty-two United States Senators in 1850³⁴ when Clay effected his most miraculous compromise, saving the union for one more critical decade.³⁵ It is quite possible that his success on that occasion was owing to the old school tie and to the unionist preaching of the Transylvania faculty.

Yet it was at all times clear that knowledge of the subjects taught at Transylvania and elsewhere—and only glancing knowledge could be acquired in the time available—would not make graduates fit to perform the political mission of the legal profession. Loyalty to the United States was, as the Transylvania faculty supposed, a useful trait in those responsible for maintaining its institutions. But it could scarcely suffice. What was also needed was a morality or professional ethic of public service.

Francis Lieber, a Prussian emigre teaching at the College of South Carolina, expressed that morality in three volumes published in the late 1830s, winning the hearty approval of law teachers and leaders of the profession such as James Kent, Joseph Story, Timothy Walker, Henry Clay, and Daniel Webster.³⁶ In short, what Lieber presented was an Americanized version of classical civic virtue, recapitulated as democratic "patriotism." He relied on classical sources familiar to educated Americans of his time, and also on many then modern European ideas, particularly those of Immanuel Kant, to explain the ethics of citizenship and political leadership.

Two of Lieber's volumes were entitled *A Manual of Political Ethics*. The third, *Legal and Political Hermeneutics*, analyzed the moral obligations of those who interpret legal texts. The latter work was republished in 1995 by the *Cardozo Law Review*³⁷ in the belief that it has contemporary value. *Hermeneutics* drew in part on German literature on the interpretation of religious texts. German divines whom

³² A recent biography is TINSLEY E. YARBROUGH, *JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN* (1995).

³³ Theodore C. Pease, *Ninian Wirt Edwards*, in 6 *DICTIONARY OF AMERICAN BIOGRAPHY* 42 (A. Johnson & D. Malone eds., 1931). Edwards was also the brother-in-law of Lincoln. On the relation, see STEPHEN B. OATES, *WITH MALICE TOWARD NONE: THE LIFE OF ABRAHAM LINCOLN* 55-66 (1977).

³⁴ They were David Atchison of Missouri, Jeremiah Clemens of Alabama, Jefferson Davis of Mississippi, Solomon W. Downs of Louisiana, George Jones of Iowa, Joseph R. Underwood of Kentucky, and James Whitcomb of Indiana. As a result of the compromise, they were joined by an eighth, William M. Gwin of California.

³⁵ MERRILL PETERSON, *THE GREAT TRIUMVIRATE: WEBSTER, CLAY, AND CALHOUN* 449-75 (1987).

³⁶ For a fuller account of these works and their reception, see Paul D. Carrington, *The Theme of Early American Law Teaching: The Political Ethics of Francis Lieber*, 42 *J. LEGAL EDUC.* 339, 361-90 (1992).

³⁷ 16 *CARDOZO L. REV.* 1883 (1995).

Lieber studied had sought to define a discipline for the Protestant ministry. Religious texts, they argued, could not be freely interpreted by each pastor, and assuredly not by each individual adherent to the faith. There is, they contended, a correct meaning of texts to be discerned by the disciplined reader who controls his or her idiosyncratic or selfish impulses and who abides by the moral premises that the texts express.

Lieber argued that the democratic lawyer and judge is a sentinel against factionalism, disorder, and chaos, and has moral obligations comparable to those of the Protestant ministry.³⁸ This political responsibility was to be discharged by lawyers who suppress factional impulses, and in a spirit of tolerance and restraint, speak for democratic values and constitutionalism.

Lieber's work was in its time a significant element of a legal education at Harvard or Yale or Transylvania, and provided the foundation on which Thomas Cooley erected Chapter IV of his illustrious 1868 treatise on *Constitutional Limitations*.³⁹ It set a tone for antebellum higher education in law—identifying such education as primarily moral in purpose. Moral purpose was familiar to higher education of that time.⁴⁰ Few Americans had yet thought of higher education as a means of acquiring technical competence. The human capitalism we often practice today was still on the horizon.

Alas, moral education, then as now, produced limited results. Reading Lieber did not transform his readers into men of virtue and wisdom. Yet, lawyers who had read Lieber and studied with teachers such as Timothy Walker or the Transylvanians were probably more likely to practice public virtue than those who had done neither of those things.

Even the Jacksonians of Lieber's and Walker's time believed that to be so. They vigorously demolished the ramparts of privilege in the professions, especially in the legal profession.⁴¹ Educational requirements for admission to the bar all but disappeared. Nevertheless, in 1837, the very year that Walker and Lieber published, a group of Jacksonians organized a law department that became the law school of New York University.⁴² Its aim was to train prudent, virtuous, Jacksonian leadership for the republic.

³⁸ See FRANK BURT FREIDEL, FRANCIS LIEBER: NINETEENTH CENTURY LIBERAL 21-22 (1948). For a contemporary analogue, see SANFORD LEVINSON, CONSTITUTIONAL FAITH 18-53 (1988).

³⁹ A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES AND OF THE AMERICAN UNION 38-84 (1868).

⁴⁰ FREDERICK RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY 3-43 (1962).

⁴¹ WARREN, *supra* note 14, at 510.

⁴² The founding professor at New York University was Benjamin F. Butler, Attorney General of the United States in the Jackson and Van Buren administrations; one of his principal

Jacksonians also founded the University of Michigan Law School. Cooley was their pre-eminent teacher.⁴³ As a Jacksonian, he revered the rights of the working poor and despised the arrogance of wealth or pretentious learning. Yet his aim as the premier teacher of constitutional law to his age was to nurture the elitist professional ethics defined by Lieber.

Jefferson and Hamilton, Clay and Jackson, Wythe and Kent and Story, Walker and Lieber and Cooley and the Transylvanians were not misguided in their hopes for the profession and for legal education. Still today, our institutions are in perpetual jeopardy. The briefest glance at the morning paper confirms our great good fortune in having a stable legal system that at least sometimes works and has worked well enough to keep democratic government from tearing itself apart for over two centuries. Others have now observed our good fortune. For a very long time, America was the only country with a written constitution enforced by courts and lawyers. But in the last half century, over a hundred countries have created such institutions⁴⁴ and thus sent their legal professions on the public errand we American lawyers have with some success attempted to perform since 1789.

Godspeed to their hopes and efforts. Yet our experience suggests cautions as well as hopes. Our country fell into the most dreadful turmoil imaginable in 1861 and only by the narrowest margin did our republic survive. It could easily have been otherwise: law cannot save a society bent on destroying itself. Moreover, we have developed no method for assuring a supply of lawyers having the moral commitments a republic requires. While we now train our lawyers much more elaborately than did Lieber or Walker or Story, there is yet only a little that training can do to create the requisite moral traits. Responsibility must be borne, if it is to be borne at all, by individual lawyers entering the profession. They train themselves or not for public duties. Teachers can help but no law school can make virtuous, self-restrained, tolerant, prudent men and women of students who do not value those traits.

Both nature and nurture make it easier for some than others to develop the particular characteristics described as civic virtue or patriotism. A key to such self-development is self-knowledge. Through awareness of one's own strengths and weaknesses, motives and

supporters was David Dudley Field. *THE LAW SCHOOL PAPERS OF BENJAMIN F. BUTLER*: NEW YORK UNIVERSITY SCHOOL OF LAW IN THE 1830s (Ronald L. Brown ed., 1987).

⁴³ ALAN R. JONES, *THE CONSTITUTIONAL CONSERVATISM OF THOMAS MCINTYRE COOLEY: A STUDY IN THE HISTORY OF IDEAS* 100-65 (1987).

⁴⁴ William W. Van Alstyne, *Notes on A Bicentennial Constitution: Part I, Processes of Change*, 1984 U. ILL. L. REV. 933, 933 (reporting nearly 160 written constitutions). With the breakup of the Soviet Union, there must be at least an additional score. The second oldest constitution is Norway's, ratified in 1815. In 1900, there were five.

prejudices, a person can become a better lawyer or public citizen. It is self-knowledge that enables good lawyers to enter the minds of clients, adversaries, and judges, to know the temper of the times, to sense the moral aspirations of the people that properly inform legal texts setting the parameters within which sensible politics must proceed. It is therefore the public duty of lawyers to know themselves, to know and discount their passions, their pride, and their prejudices. More than anything one can learn by formal study of law, useful lawyering requires professional judgment animated and informed by an appreciation of the values and moral aspirations of the people whom public lawyers assist in governing themselves.

The two American legal careers that are my subject illustrate the importance and the difficulty of acquiring the traits that Lieber described as patriotism and that the ancients described as virtue. Both men of whom I write devoted much of their careers to public life, but both were also private lawyers, one for a decade, the other for more than two. They were contemporaries.

One of them was born and raised near Beacon Hill in Boston.⁴⁵ His father was a lawyer. He attended Harvard College and Harvard Law School. The most eminent professor at the Harvard Law School (who happened also to be a Justice of the Supreme Court of the United States) was the college roommate of his father, and took a very special interest in his education. He was given employment in the Harvard Law Library so that he could continue his study an extra year. Later, his professor lent him money so that he could study law in Europe.⁴⁶ He was for a time appointed to a junior faculty position and groomed to succeed his distinguished mentor as the principal professor at the Harvard Law School. He was counseled by Ralph Waldo Emerson, by his distinguished seniors on Beacon Hill,⁴⁷ and by most of the elite lawyers of his time, including his mentor's friends, Daniel Webster and James Kent, the eminent Chancellor of New York. If education alone could make a man a sound lawyer, then Charles Sumner should have excelled in our profession.

His rural contemporary was as a child moved from one impoverished farm to another, living in conditions more primitive than any seen in Europe since the twelfth century. If things were not bad enough, his father was a lousy farmer. Cholera, the scourge of 19th century rural America, took his mother when he was seven.⁴⁸ He and two siblings were thereafter raised by a stepmother having four children of her own. He once attended school for a few weeks, but that

⁴⁵ DAVID H. DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* 4 (1960) [hereinafter DONALD, SUMNER].

⁴⁶ *Id.* at 44.

⁴⁷ *Id.* at 71.

⁴⁸ CARL SANDBURG, *ABRAHAM LINCOLN, THE PRAIRIE YEARS* 38-40 (1926).

was the only formal education he ever received. When he was 29 years old, a court found him to be of good moral character and certified him to practice law in the courts of Illinois.⁴⁹ He was never an apprentice lawyer, he never had a mentor in law, and he never received any instruction, except by experience.⁵⁰ If academic achievement were essential to make a good lawyer, then Abraham Lincoln had no chance.

While Sumner was at the Harvard Law School, Lincoln was a shop clerk and a militiaman sent to fight Indians in Wisconsin.⁵¹ In 1834, when Sumner was practicing law in Boston and teaching at Harvard, Lincoln was a surveyor elected by vote of the people to serve in the state legislature.⁵² In 1838, the year that Lincoln commenced practice in the "hog wallow" that Springfield then was, Sumner went to Europe to visit with the political elite there.⁵³

From his law office in Springfield, Lincoln practiced in an itinerant court, following it on horseback through the villages of rural Illinois.⁵⁴ He contested more than one thousand trials, most of them involving such matters as a promissory note or the ownership of a hog. He argued hundreds of appeals. He defended persons charged with crime. On circuit, he lived in close quarters with other lawyers, disputing with them in the day, eating with them in the evening, and of necessity sleeping with them at night, as many as four to a bed in the crude rural taverns of that time and place.

By 1842, Sumner was practicing in Boston with the lions of the bar.⁵⁵ He participated in dozens of large commercial cases litigated in the federal court in that city. A Justice of the Supreme Court sent him clients, and so did many family friends on Beacon Hill. Yet somehow the predictable course of events did not occur.⁵⁶ Sumner's practice declined. He was denied the expected appointment as a professor at Harvard,⁵⁷ he forsook the representation of clients for politics.

By 1850, Lincoln's professional standing was rising rapidly. Indeed, by the time of his famous debates with Senator Douglas in 1858, he was widely recognized as one of the premier lawyers in Illinois, his services sought by railroads and others having funds sufficient to buy

⁴⁹ JOHN P. FRANK, *LINCOLN AS A LAWYER* 14 (1961).

⁵⁰ He commenced practice in association with a political friend, John Todd Stuart, whom he had met while serving in the Black Hawk War. Stuart provided him with cases but little if any supervision or instruction. He later practiced with Stephen Logan, who was an accomplished lawyer, and who may have provided Lincoln with a role model. DAVID H. DONALD, *LINCOLN* 45-46, 70-71, 99-100 (1995) [hereinafter DONALD, *LINCOLN*].

⁵¹ SANDBURG, *supra* note 48, at 150-60.

⁵² *Id.* at 184-91.

⁵³ DONALD, *SUMNER*, *supra* note 45, at 45-69.

⁵⁴ FRANK, *supra* note 49, at 15-23.

⁵⁵ DONALD, *SUMNER*, *supra* note 45, at 31-32.

⁵⁶ *Id.* at 82-83.

⁵⁷ *Id.* at 129.

the best legal representation in the state.⁵⁸ He continued to practice almost until the day he left Illinois to assume his duties as President of the United States,⁵⁹ and he planned to return to private practice when he completed his service in high office.⁶⁰

How could Lincoln have succeeded so brilliantly? How could Sumner have failed? Answers will not be found in a comparison of their academic attainments. Sumner forgot more law than Lincoln ever knew. Sumner was on intimate terms not only with American law, but English legal history and French and German law based on the Roman system embodied in Justinian's Institutes decreed in the sixth century. Lincoln had carefully read an American edition of Blackstone, *Chitty on Pleading*, *Story on Equity*, and *Greenleaf on Evidence*, but little else of law except statutes and precedents bearing on his cases, which he read as occasions required.⁶¹ As his competence and his practice grew, he acquired a substantial fund of legal knowledge, but John Frank, the historian of Lincoln's law practice affirmed that there remained "perfectly astonishing major gaps in Lincoln's general legal understanding."⁶²

The explanation of the contrasting results lies in the contrasting characters of the two men. As Frank reports, Lincoln came to law already possessing qualities "that the best lawyer in America might well trade all his books for."⁶³ Among the most valuable of those qualities were his capacities to enter the minds of other persons and to know his own.

In his youth, others detected in Lincoln an extraordinary maturity in these respects,⁶⁴ but he worked all his life to enlarge these capacities. He taught himself not only law, but to see the world as others see it. Because of this capacity, he was able to maintain a solid purchase on reality. He seldom deceived himself about his prospects or the prospects of his clients. Because he knew others, he could recognize his own impulses; he knew himself as few men or women ever have. That was the source of his awesome integrity.

Sumner, in contrast, seems seldom to have tried to understand others. Clients found him inattentive and often uncomprehending of their problems and concerns. A Boston woman who observed him over many years described him as a "specimen of prolonged and mor-

⁵⁸ FRANK, *supra* note 49, at 84-89.

⁵⁹ He appeared in federal court twice in June 1860 after his nomination as the Republican candidate for President. JOHN J. DUFF, A. LINCOLN: PRAIRIE LAWYER 365 (1960).

⁶⁰ OATES, *supra* note 33, at 207.

⁶¹ DONALD, LINCOLN, *supra* note 50, at 100.

⁶² FRANK, *supra* note 49, at 12.

⁶³ *Id.* at 97.

⁶⁴ SANDBURG, *supra* note 48, at 142-80.

bid juvenility."⁶⁵ In 1864, Julia Ward Howe paid him a visit and asked if he had yet seen the actor Edwin Booth, whose talents were then widely celebrated. "Why no," he replied, "I long since ceased to take any interest in individuals!" To which the redoubtable Mrs. Howe is said to have replied: "You have made great progress, Charles. God has not yet gone so far."⁶⁶ Because Sumner took so little interest in others, he was unusually inept at taking his own measure. He was often seen to take leave of reality, to posit as the basis for actions or decisions facts that existed only in his own dreams. Sumner saw himself not as a mere person, but as a cause: "[I]f I should fail," he said, "I feel that I should go far to destroy all confidence in man."⁶⁷ "It is not I who speak. I am nothing. It is the cause whose voice I am that addresses you."⁶⁸

This fundamental difference between the two men was reflected in other traits. Lincoln, the sensitive reader of other men's minds, was a natural wit. He added to his native talent an inexhaustible store of anecdotes; always used to the point, they added immensely to his powers as a jury advocate. His disarming humor also enabled him to win the affection and trust of other lawyers. At least one fellow decades later recalled: "God, he was funny."⁶⁹ Sumner, in contrast, was famously lacking in humor; it was said in this respect, that he "tacked slowly, like a frigate,"⁷⁰ and "you might as well look for a joke in the Book of Revelations."⁷¹ Especially was he lacking in appreciation of humor directed at himself. He thereby made himself a ripe target for the barbs of others. By the same token, he was "amazingly sensitive to praise."⁷²

Both Lincoln and Sumner employed their reading in their professional and political speaking. Lincoln's speeches are replete with biblical and Shakespearean metaphors⁷³ that were familiar to his audiences. He seldom invoked literary authority, and he avoided the use of words or phrases that would not be understood by his listeners.⁷⁴ Conversely, Sumner made of himself a pedant. His speeches

⁶⁵ DONALD, SUMNER, *supra* note 45, at 91.

⁶⁶ DAVID H. DONALD, CHARLES SUMNER AND THE RIGHTS OF MAN 146-47 (1970) [hereinafter DONALD, RIGHTS].

⁶⁷ DONALD, SUMNER, *supra* note 45, at 204. See also the remarks of Charles Dana quoted in DONALD, RIGHTS, *supra* note 66, at 80.

⁶⁸ DONALD, RIGHTS, *supra* note 66, at 251.

⁶⁹ FRANK, *supra* note 49, at 23.

⁷⁰ This characterization is attributed to William Wetmore Story. DONALD, SUMNER, *supra* note 45, at 37.

⁷¹ DONALD, RIGHTS, *supra* note 66, at 218.

⁷² Horace Mann is responsible for this description. *Id.* at 224.

⁷³ Lincoln claimed to have read *MacBeth* as frequently as "any unprofessional reader." DUFF, *supra* note 59, at 11.

⁷⁴ FRANK, *supra* note 49, at 23-24.

are laden with obscure references and foreign terms.⁷⁵ Sumner was a powerful speaker; his audiences were unfailingly impressed with his forcefulness and erudition, but were seldom caused to change their opinions. Lincoln spoke in a high-pitched voice that carried for distance, but not for force.⁷⁶ Sumner's art form was not argument, but invective; his weapon was not persuasion, but intimidation. Lincoln's speeches were generally understood and sometimes changed peoples' minds.

Lincoln's solid purchase on reality assured the wisdom of his counsel in the settlement of disputes, for he could see the strengths and the weaknesses of competing positions. Because of this ability, Lincoln was able often to mediate disputes before undertaking a representation.⁷⁷ He was a problem-solver. Although at times he thereby deprived himself of a professional fee, he created peace where there had been no peace. Sumner, in contrast, lacked the judgment and self-control to be effective in settling disputes. He was, his mentor Story ruefully declared, a bull in a china shop,⁷⁸ creating friction and conflict when there might have been at least a chance of peace. He was constitutionally unable to compromise. He gave dramatic proof of this disability late in his career, at a time when one might have expected some mature judgment, by resisting the Thirteenth,⁷⁹ Fourteenth,⁸⁰ and Fifteenth Amendments,⁸¹ three provisions that embedded in the Constitution principles that he had so long advocated. He gave different reasons for each position, but each was the product of petulance borne of the fact that his preferences were not indulged in the drafting. In a speech he regarded as his best, he denounced the Fourteenth Amendment as too vague to be useful.⁸² Sumner did not solve problems, he made them.

The same traits that made Lincoln a skillful mediator and negotiator also served him well as an advocate. Even in the most bitter disputes, he proved able to state his adversary's case with disarming fairness and dispassion. It was Lincoln's dictum in private practice and in politics "never to *plead* what you need not, lest you oblige yourself to *prove* what you can not."⁸³ Yet on what he perceived to be

⁷⁵ DONALD, RIGHTS, *supra* note 66, at 217.

⁷⁶ GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 36 (1992).

⁷⁷ FRANK, *supra* note 49, at 4.

⁷⁸ DONALD, SUMNER, *supra* note 45, at 113.

⁷⁹ DONALD, RIGHTS, *supra* note 66, at 9, 150-51.

⁸⁰ *Id.* at 246. He later withdrew his opposition for reasons of health. *Id.* at 263.

⁸¹ *Id.* at 352.

⁸² *Id.* at 246.

⁸³ FRANK, *supra* note 49, at 99-100 (quoting a letter to U. F. Linder, February 20, 1848).

main points, when his client's legitimate interests were threatened, he was a fierce advocate.⁸⁴ An adversary described his style thus:

As he entered the trial, where most lawyers would object, [Lincoln] would say he "reckoned" it would be fair to let this in, or that; and sometimes, when his adversary could not quite prove what Lincoln knew to be the truth, he "reckoned" it would be fair to admit the truth of so-and-so He was wise as a serpent in the trial of a cause, but I have had too many scars from his blows to certify that he was harmless as a dove. When the whole thing was unraveled, the adversary would begin to see that what he was so blandly giving away was simply what he couldn't get and keep. By giving away six points and arguing the seventh, he traded away everything which would give him the least aid in carrying that.⁸⁵

Sumner lacked this kind of self-restraint. In contrast to Lincoln, Sumner was given to broadsides, conceding nothing and asking or even demanding what could not be given.

Another reason that clients and citizens were attracted to Lincoln and repelled by Sumner lay in their work habits. Lincoln was willing to work very long hours to do the necessary drudgery of the law against which he warned all novices who might be jealous of their time.⁸⁶ Sumner was supremely uninterested in such routine drudgeries as bills of court costs, which he professed to be unable to comprehend.⁸⁷ He may have put in some long hours, but almost always on undertakings gratifying to himself. He was insufficiently interested in the welfare of his clients to suffer boredom in their behalf. Even in public life, Lincoln was far more attentive to noisome details that Sumner was prone to overlook.

Lincoln was able on many occasions in private and public life to effect a result by assigning the credit for it to some other person—a judge, a client, an associate, even a rival. It seems that one way in which Lincoln managed his relationship with Sumner was by allowing Sumner to believe that Lincoln was doing his bidding when Lincoln was doing just as he had intended all along.⁸⁸ Such useful arts of manipulation were quite beyond Sumner.

Although at least at times intensely ambitious,⁸⁹ Lincoln appeared to have no more than moderate interest in his own welfare, or perhaps he simply took a longer view of his own welfare than most of us are able to mount. This was indicated by his willingness to mediate disputes in which he might have earned a fee. And even after Lincoln

⁸⁴ DONALD, LINCOLN, *supra* note 50, at 148.

⁸⁵ WILLIAM H. HERNDON & JESSE W. WEIK, *HERNDON'S LINCOLN: THE TRUE STORY OF A GREAT LIFE* 334 (1942). This work was first published in 1889.

⁸⁶ *Notes for a Law Lecture, July 1, 1850*, in 2 *COMPLETE WORKS OF ABRAHAM LINCOLN* 142 (J. Nicolay & J. Hay eds., 1905).

⁸⁷ DONALD, SUMNER, *supra* note 45, at 82.

⁸⁸ DONALD, RIGHTS, *supra* note 66, at 166-67.

⁸⁹ MICHAEL BURLINGAME, *THE INNER WORLD OF ABRAHAM LINCOLN* 236-67 (1994).

was recognized as a rare talent whose services were in demand by railroads and large corporate clients, he maintained relatively modest billings for his services.⁹⁰

Sumner's self-indulgence was not evidenced by any greed in billing practices. He was, however, seldom in a position to be tempted to gouge his few clients. But in his public life, he manifested a different form of impetuous self-aggrandizement against which Lincoln's self-discipline contrasted. As a public speaker, Sumner never failed to claim for himself the highest possible moral ground. Peace, antislavery, prison reform—these were the causes he embraced, and most people then and now would applaud the selection. But so relentless was his moralizing that it seemed that his motives were not compassion for slaves or prisoners or war victims so much as an urge to vilify fellow beings as his moral inferiors.

Sumner did not let up, even on fellow Senators whose support he needed; Senator Stewart complained of Sumner's perpetually "haughty, domineering tone . . . that demands all the amenities for himself and none for his fellow Senators," and indeed, Sumner was given to identifying any opinion with which he disagreed as a pro-slavery opinion, leading Senator Trumbull to ask, "[h]as he any higher claims to patriotism or loyalty or to devotion to the country than anybody else?"⁹¹ Thus, while Lincoln sought to befriend his adversaries, Sumner seemingly reveled in generating hostility. He seemed possessed by the same demons that made his New England Puritan forebears so intolerant of difference and dissent, and that cause many men and women everywhere to dehumanize their fellow beings of different beliefs, pigmentations, and tongues—demons to which almost all of us succumb in moments of weakness and provocation. Few could have been surprised when he was assaulted on the floor of the Senate by Congressman Brooks of South Carolina.⁹² So violent had been Sumner's invective leading up to that event that even nonviolent Southerners were not altogether critical of Brooks' vicious and cowardly attack. Sumner had himself been a cause of war for he embodied the qualities of moral arrogance from which Southerners so strongly desired disunion that they would sacrifice their lives and property to resist what he stood for.⁹³

But slaveowners were not the sole object of Sumner's provocations. When he was invited to make a public address on July 4, 1845, he seized the occasion to denounce the same Revolutionary War, that his audience had gathered to celebrate, as a breach of peace, pro-

⁹⁰ DONALD, LINCOLN, *supra* note 50, at 148; FRANK, *supra* note 49 at 39-40, 170.

⁹¹ DONALD, RIGHTS, *supra* note 66, at 430-31.

⁹² DONALD, SUMNER, *supra* note 45, at 294-97.

⁹³ CARL SANDBURG, ABRAHAM LINCOLN: THE WAR YEARS 104 (1939).

claiming that no war could ever be justified.⁹⁴ This speech, which a Boston editorialist proclaimed worthy of "an insane Quaker in his dotage,"⁹⁵ was the product of Sumner's quite sane opposition to the War with Mexico, a position shared by Lincoln and many others. But Sumner did not stop with opposing that war. It was typical of his intemperance that he turned his invective on a Massachusetts Congressman who shared his opposition to that war; Congressman Winthrop became Sumner's target because he voted to appropriate funds to feed and equip the troops in the field.⁹⁶ Sumner not only wanted our troops to starve, but despised Winthrop for disagreeing with him on that point.

And later, at a time when relations with Great Britain were of signal importance to the conduct of the war against the slave states, Sumner as Chairman of the Senate Foreign Relations Committee delivered a long and widely reported address proclaiming on very little evidence and no established law that Great Britain was violating international law by supporting the Confederacy.⁹⁷ Such generalizations and overstatements, every good lawyer knows, threaten the cause they are uttered to support, and in this instance, Sumner's conduct could have been disastrous.

Sumner's appetite for generating hostility was a perpetual burden to his political allies. Senator William Fessenden, an advocate of the Fourteenth Amendment, complained that his cause was harmed by Sumner's "petty schoolmaster-like conceit, and by the everlasting pompous display of his rhetorical superficiality and undigested erudition."⁹⁸ When it appeared that the amendment would not be ratified, Fessenden blamed the result on Sumner.⁹⁹ It was often deplored that Sumner forced "the truest Republicans and antislavery apostles . . . to put him down."¹⁰⁰

Our country paid a dreadful price for the public's failure to follow Lincoln and other leaders of his prudent bent, and Sumner played a role in that failure. The war that broke in 1861 was among the bloodiest in human history; it killed or maimed one fourth of the American males who were of military age. That war was of course a stupendous waste that reasonable persons would have avoided. Lincoln had fol-

⁹⁴ DONALD, SUMNER, *supra* note 45, at 109-11.

⁹⁵ *Id.* at 112. Francis Lieber was present and recorded that it was "one of the worst reasoned speeches I have ever heard." THOMAS PERRY, LIFE AND LETTERS OF FRANCIS LIEBER 198 (Boston, 1880).

⁹⁶ DONALD, SUMNER, *supra* note 45, at 143-45.

⁹⁷ DONALD, RIGHTS, *supra* note 66, at 125-37.

⁹⁸ *Id.* at 152.

⁹⁹ FRANCIS FESSENDEN, LIFE AND PUBLIC SERVICES OF WILLIAM PITT FESSENDEN 66 (1907).

¹⁰⁰ DONALD, RIGHTS, *supra* note 66, at 152.

lowed James Madison and Henry Clay¹⁰¹ in proposing the only peaceful method by which that holocaust might have been averted. Their emancipationist policy called for the purchase of slaves from their masters and their relocation, if they chose, on land of their own in Africa or the west or in central America.

That policy apparently had no real chance. It was stoutly resisted by those caught up in the slave culture. They sacrificed half their sons and brothers and husbands to perpetuate slavery and were unable to consider any method or plan by which that institution could have been brought to the end that most members of the Revolutionary generation had foreseen. Even as late as 1863, Lincoln still favored buying the slaves in those states remaining in the Union.¹⁰² He estimated that the slaves in those slave states remaining in the union could be purchased for a price equal to the cost incurred by the government in conducting the war for about three months.¹⁰³ Unaccountably, slave owners in Missouri and Kentucky clung desperately to their way of life, despite the doom so obviously hanging over it.¹⁰⁴ Who would support them in their opposition to the legislation? Sumner, of course, who thought it immoral to compensate slaveowners. "Palsied be the tongue," he said, of anyone who "speaks of compromise with slavery."¹⁰⁵

It is pointless now to denounce the obstinacy of slaveowners or the moral arrogance of those abolitionists who shared Sumner's insistence on dehumanizing their adversaries. Yet it may still be instructive to note that Madison and Clay and Lincoln had the right answer. All the slaves in the country could have been acquired for less than half the out-of-pocket cost to the union of waging the war. Never mind the cost of waging the rebellion or the cost of lives and limbs and destroyed property, or the veterans' benefits paid to soldiers on both sides of the conflict over the ensuing half century. The emancipationist policy would have distributed the cost of emancipation over the whole of the population who would benefit from it instead of imposing the whole cost on the few who would suffer from it. It held the prospect of achieving freedom for slaves on relatively amiable terms that would have greatly enhanced the prospects for a successful Reconstruction.

¹⁰¹ A forceful statement of the emancipationist position is in Henry Clay, *Address to the Colonization Society of Kentucky* (Dec. 17, 1829) in 8 HENRY CLAY, *THE PAPERS OF HENRY CLAY* 138, 152-57 (Robert Seager ed., 1984).

¹⁰² For a brief account of the last effort to promote compensated emancipation, see DONALD, LINCOLN, *supra* note 50, at 346-48. The policy was implemented in the District of Columbia. *Id.*

¹⁰³ JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* 498 (1989).

¹⁰⁴ DONALD, LINCOLN, *supra* note 50, at 362.

¹⁰⁵ DONALD, *RIGHTS*, *supra* note 66, at 120. Lincoln did for a time persuade Sumner to suppress his hostility to the idea. DONALD, LINCOLN, *supra* note 50, at 345.

And it is still instructive to note the high cost of moral arrogance that dehumanizes dissenters and adversaries. Sumner, the ardent pacifist of 1845, preferred in 1862 to send a million men into the mouths of cannons rather than yield anything to the manifest interests of those he despised. Is it any wonder that private clients forsook the advice of such a man?

The contrast between Lincoln and Sumner in these numerous respects is ironic. Sumner, Story's favorite student, so long nurtured by the Justice, was introduced by him to Francis Lieber, who became a personal friend.¹⁰⁶ It is likely that Sumner read Lieber's works on political ethics while they were still in draft. Yet Lieber early recognized that Sumner was unfit for public service, and told Sumner that his election to the Senate was a mistake.¹⁰⁷ Lieber pegged Sumner as a Jacobin whose method "has never gained the ultimate victory though often a battle, and he has never sown, planted, gathered, fed, but has always destroyed, embittered, ruined and cursed."¹⁰⁸ It could have been Sumner whom Lieber had in mind in devoting several pages of his work to the duty of those emotionally unsuited to the practice of public virtue to abstain from holding public office.¹⁰⁹ And Lincoln, the rustic who literally walked in from the woods untutored in the moral precepts identified by Lieber, possessed them all to an exceptional degree. What Story did not and perhaps could not teach Sumner was to know himself, whereas it was self-knowledge that Lincoln had mastered.

One need not disagree with his abolitionist position to conclude that Charles Sumner was not on the whole a very good lawyer. Could he have made himself one? I do not doubt that he could. But he would have had to lead a very different life, one that brought him into close and respectful contact with many persons, preferably diverse persons who see the world through very different lenses. He would have had to try long and hard to see, to feel, to understand, their motives and their prejudices. He would then have had to employ the insights thus gained to see himself as others see him.

Had Sumner been able to see himself in this critical light, his moral arrogance would have dissolved, for he would have had the painful but valuable knowledge that even Charles Sumner sinned as much as most. He would have known that given different chances of life, he, too, could have found himself a slavemaster, a prison guard, or even a soldier of fortune. His intellectual arrogance, too, would have been laid aside, for he would have discovered that even Charles Sumner, for all his learning, could not overpower the wills of others,

¹⁰⁶ DONALD, *RIGHTS*, *supra* note 66, at 24; FREIDEL, *supra* note 38, at 109-10.

¹⁰⁷ PERRY, *supra* note 95, at 251.

¹⁰⁸ FREIDEL, *supra* note 38, at 255 (quoting a letter to Hillard, April 28, 1851).

¹⁰⁹ FRANCIS LIEBER, *MANUAL OF POLITICAL ETHICS* 258 (Theodore Woolsey ed., 1875).

even those far less learned than himself. It would have been far easier for him to negotiate and to mediate. He would have solved more problems and created fewer. He would not have been a rigid ideologue, but a person capable of practical judgment. All these useful traits might in some measures have been gained by Sumner had he been able to search and know himself. As the poet has recorded, the gift of seeing one's self is seldom if ever given to us.¹¹⁰ But it can in some measure be earned. The task of the teacher pursuing the aim of Wythe and Walker and Lieber is to create an experience causing students to want to earn it. Even this is an elusive objective.

Students of American law accepting the charge to prepare themselves for public duty have to pay an additional tuition—a tuition higher than any university would dare charge. That tuition is paid not in coin, but in self-inflicted discomfort. Critical examination of one's own irrationalities can be quite unsettling. Those who excel in that examination encounter many unwelcome discoveries of their own previously unrecognized prejudices. They learn that their ideologies, those secular faiths that help give them an identity, are less tenable than they would like to suppose. They learn self-doubt as well as self-confidence. They discern motives in themselves that are less handsome than those they would like to own. They learn that they are less clever than they hoped. And they assimilate the knowledge that their petty efforts can be seen in the grand scale of things to be an occasion for humor. All that is painful learning. We all prefer those comfortable illusions about ourselves that are today too often celebrated as self-esteem. But those comforts to which we cling are disabling to sound professional judgment.

Some think to avoid the need for such unpleasant learning by avoiding public responsibility. Most contemporary lawyers are not of a mind to seek public office. There is however no shelter within the law from public responsibility. Ours is a public profession. One cannot be a part of a democratic legal system and disown public responsibility and duty. One either helps to perform that shared responsibility or impedes its performance by others.

Moreover, as the lives of Lincoln and Sumner exhibit, there is a commonality in the traits making for success in law whether one acts on the public stage or as a private advocate and counselor. Lincoln's deep self-knowledge made him a success in both arenas. Sumner's blindness to his own moral failings made him all but useless to clients and grievously impaired his value as a public person. This is not to say that the world has no place for the likes of Sumner or that he was past

110 "Oh wad some power the giftie gie us
To see oursels as others see us!
It wad frae monie a blunder free us,
An foolish notion." — Robert Burns, *To A Louse* (1786).

all hope of moral redemption. Sumner was not an evil man, only a bad lawyer who disserved both his private clients and the commonweal.

The comparison of Lincoln with Sumner demonstrates that success in gaining the maturity and professional judgment associated with a sound knowledge of self will not depend on one's law school grade point average or other accoutrements of academic status. Indeed, in professional work in law, integrity and mature judgment often prevail over genius. Cicero may have said that "the fruits of speculative genius in government are of little value."¹¹¹ Thucydides long before Cicero concluded that "ordinary men usually manage public affairs better than their more gifted fellows."¹¹² The latter, he said, are

always wanting to appear wiser than the laws and to overrule every proposition brought forward, thinking that they cannot show their wit in more [routine] matters, and by such behavior too often ruin the country, while those who mistrust their own cleverness are content to be less learned than the laws and being fair judges rather than rival athletes, generally conduct affairs successfully.¹¹³

And Hugh Henry Brackenridge, an eighteenth century lawyer in frontier Pittsburgh and author of the most widely read American novel of his times, affirmed that

mere genius goes but a little way in making the lawyer. A court, and even a jury, will rather hear him who has some depth of judgment but without volubility or grace of diction than all that elegant vociferation where the knowledge is pretense.¹¹⁴

Could Cicero, Thucydides, and Brackenridge have known Lincoln and Sumner?¹¹⁵ One must be an earnest student of the law as well as of oneself, but one need not be a great pupil like Sumner to be a talent as a lawyer. Lincoln himself cautioned that "towering genius disdains a beaten path" and will pursue distinction at whatever expense to others.¹¹⁶ This warning, like much else in his political judgment was

¹¹¹ A reasonable effort has not disclosed the source of this quote. The phrase is, in any case, not mine. It might be Thomas Cooley's. See *Sources of Inspiration in Legal Pursuits*, 9 WESTERN JURIST 515, 520-21 (1875), but he attributed the thought to Cicero and the thought is expressed less aptly by Cicero in *ON THE COMMONWEALTH* 106, 153 (George Holland Sabine & Stanley Barney Smith trans., 1976).

¹¹² *HISTORY OF THE PELOPONNESIAN WAR* bk. III, § 37 (Rex Warner, Baltimore, 1959) (quoting Cleon, the son of Claenetus) (circa 404 B.C.).

¹¹³ *Id.*

¹¹⁴ *LAW MISCELLANIES* xviii (Philadelphia, Byrne, 1814).

¹¹⁵ For a recent utterance in the same vein, see Daniel A. Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917 (1986).

¹¹⁶ *The Perpetuation of Our Political Institutions*, address to the Young Men's Lyceum, Springfield, January, 1838. 1 *COLLECTED WORKS OF ABRAHAM LINCOLN* 108, 114 (Roy Basler ed., 1953). Later psycho-historians have placed great emphasis on this talk, going so far as to contend that it expressed his own demonic motive to strike down the Founding Fathers. See, e.g., DWIGHT G. ANDERSON, *ABRAHAM LINCOLN: THE QUEST FOR IMMORTALITY* (1982). There is no basis for the inference that Lincoln was inhabited by many demons who were driving him to

derived from his self-knowledge; he was on intimate terms with the demons within himself.

It is unlikely that any reader will be called to a mission as grave as Lincoln's. Yet every state needs a Lincoln. And every city or town or village. And every company or labor union or organization or family. The traits borne of self-knowledge and self-discipline can be applied in a thousand crises large and small. Indeed, crises and conflicts have a lot in common. Who owns a hog can be to those directly involved as critical a matter as an international boundary dispute and requires a professional talent and commitment that is not so very different.

Prudent resolution even of a dispute over a hog has its rewards. Among them is the satisfaction that comes from putting one's talents to a good use. Lawyers no less than others need that satisfaction. Brackenridge, who was just quoted, attributed that very human need to divine origin, saying that it was "implanted in us to distinguish us from the brutal world," and that it is a "foundation for our happiness."¹¹⁷ Evolutionary psychologists now tell us that such moral impulses have biological origins.¹¹⁸ Whatever its source, our need to be useful to others is real and widely shared. Learned Hand likened lawyers to workers in a hive. It is hard to perceive our contribution, he observed, except that the hive goes on, "an entity, a living thing, a form, a reality."¹¹⁹ Our moral fates as lawyers are thus shared by the republic. It is those who live and work in this knowledge that receive our profession's rewards.

the cusp of dictatorship. The contrary inference is more appropriate—because Lincoln knew his demons, he had them under control. True despots lack that self-knowledge. For suitably dismissive comments on such pseudo-science, see George M. Frederickson, *Lincoln and His Legend*, *NEW YORK REVIEW OF BOOKS*, July 15, 1982, at 13-16. See also MERRILL D. PETERSON, *LINCOLN IN AMERICAN MEMORY* 382-83 (1994).

¹¹⁷ BRACKENRIDGE, *supra* note 114, at iii.

¹¹⁸ See JAMES Q. WILSON, *THE MORAL SENSE* xiv, 135-37 (1993).

¹¹⁹ *To Yale Law Graduates*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 84, 89 (Irving Dillard ed., 1952).